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# Sequestration and the *Spes Successionis*

*William W McBryde and George L Gretton\**

*Practical and theoretical problems arise from the vesting in a permanent trustee in sequestration of legal rights, rights under a will and rights under an established trust. This article considers the meaning of s 31(5) of the Bankruptcy (Scotland) Act 1985, particularly in the context of what happens after a debtor has been discharged. The various arguments are analysed in detail, with a consideration of the history and policy of the law. Although the authors differ on what the current law is, they both conclude that reform is necessary.*

## A. INTRODUCTION

When a person is sequestrated, all that person's assets (subject to some exceptions) pass to the trustee in sequestration<sup>1</sup> for the benefit of the creditors. The same is true of assets which the debtor acquires between the time of the sequestration and the subsequent discharge, which, in the normal case, will be three years after the date of the sequestration. But anything which the debtor acquires after the discharge is his, or hers, to keep. Thus if the debtor receives a legacy, or becomes the beneficiary of a trust, whether the benefit will pass to the creditors is a question which depends on timing. In bankruptcy, a great deal depends on timing.

A benefit under a will or trust is capable of passing to the trustee in sequestration even if it is not one which confers present possession. For instance, suppose that there is a liferent and fee, and the debtor is the fiar. The fee will pass to the trustee in sequestration even though the liferenter is still alive, and this is true both (a) if the debtor already had the fee at the time of sequestration and (b) if the debtor acquired the fee after the sequestration but before the discharge.

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1 There are in fact two sorts of trustee in sequestration, interim and permanent. Vesting takes place only in the permanent trustee. When we refer to "trustee in sequestration", or "trustee", for short, we mean a permanent trustee.

So far, so good. But what about cases where a right under a will or trust vests after the debtor has been discharged? Can the trustee in sequestration claim it on the basis that the debtor, before being discharged, had a sort of potential right to it? Can the trustee argue, in other words, that that potential right was itself part of the debtor's estate, and so the full right into which it has turned is also part of that estate?

### (1) Some examples

Here are some examples:

- (a) Chris is sequestrated. His mother, Anna, dies. Chris is entitled to *legitim* from her estate. What happens to the legitim if Anna dies (i) the day before Chris's sequestration, (ii) the day before Chris's discharge, or (iii) the day after Chris's discharge?
- (b) At the time of his sequestration, Chris is named in Anna's will as the beneficiary of a legacy. Anna is still alive at this stage. What happens to the legacy if Anna dies (i) the day before Chris's sequestration, (ii) the day before Chris's discharge, or (iii) the day after Chris's discharge? Would it make a difference if Anna made her will after the date of Chris's sequestration, rather than before it?
- (c) Anna in her will leaves property in trust, to be held for Brian in liferent and for Chris, whom failing Diana, in fee. Anna dies, and is survived by Brian, Chris and Diana. Even the most casual acquaintance with Henderson on *Vesting*<sup>2</sup> will reveal that the fee is unvested. Both Chris and Diana are potential fiars: we do not yet know which of them will at the end of the day actually take the fee. At this stage Chris is sequestrated. Three years later he is discharged. One year later Brian dies. The fee now vests in Chris, and Diana will take nothing. But who actually benefits from this fee?

These questions are difficult. They are difficult in terms of policy: what should the rule be? And they are difficult in terms of black-letter law: what in fact is the law of Scotland on these matters? If Chris was sequestrated in 1987, and discharged in 1990, and his mother, Anna, dies in 2020, can it really be the law that, on her death, Chris's trustee will be able to demand from Anna's executor Chris's share of *legitim*, for the benefit of Chris's pre-1987 creditors? And if this is the law (which is uncertain), should it be the law? These are questions which are far from being only of academic interest. They are of practical importance. Indeed so important are they in practice, and so obscure is the current statutory provision, that we suggest that, when the opportunity presents, the Bankruptcy (Scotland) 1985 Act must be amended.

2 R Candlish Henderson, *The Principles of Vesting*, 2nd edn (1938).

## (2) What the Bankruptcy (Scotland) Act 1985 says

Section 31 of the Bankruptcy (Scotland) Act 1985 provides for the vesting of the estate of the debtor as at the date of sequestration,<sup>3</sup> the vesting being in favour of the trustee in sequestration for the benefit of the creditors. Section 31(5) provides:

Any non-vested contingent interest which the debtor has shall vest in the permanent trustee as if an assignation of that interest had been executed by the debtor and intimation thereof made at the date of sequestration.

What does this mean? The answer is elusive. There appears to be a logical fallacy in attempting to vest in a trustee an unvested right. The practical effect, at present, is that trustees in sequestration are claiming from discharged debtors rights which vested after discharge but which were unvested and contingent at the date of sequestration. The trustee in sequestration is likely to found on a passage in McBryde on *Bankruptcy*,<sup>4</sup> and will claim the money or property acquired by the debtor, even although the debtor is discharged. The debtor may seek to found on the different approach indicated by Professor Gretton.<sup>5</sup>

If it is the case that trustees may claim rights which vest many years after the debtor's discharge, there are obvious problems for all involved. The trustee will be uncertain when the sequestration ends, and will need continuing information about the debtor's circumstances. The debtor may feel that there has been no "new start" and may suffer emotionally, not to mention financially. There may be emotional upset in the family at large, since it is likely to be felt that the original truster or testator never intended such a consequence. Executors and trustees do not know to whom payment should be made. Paying the wrong person, knowing about the sequestration, can expose them to personal liability.<sup>6</sup>

## (3) Meaning of "*spes successionis*"

Though the term is not used in the 1985 Act itself, the case-law refers to "*spes successionis*", which means a hope, or chance, of succession. Unfortunately, nowhere has the concept been fully analysed in Scots law, and this leads to difficulties. The expression can be used in (at least) three ways. For convenience, we will in this article refer to these three types by their number.

- (1) Rights arising *ex lege*, such as legitim.
- (2) Rights arising under a revocable deed, such as the will of a person who is alive.
- (3) Rights arising under an irrevocable deed, such as an established trust.

3 For the definition of "date of sequestration" see s 12(4) of the 1985 Act.

4 2nd edn (1995) paras 9–150 and 151.

5 "The assignation of contingent rights" 1993 *Juridical Review* 23 at 32–33.

6 *Rankin's Trustee v H C Somerville & Russell* 1999 SC 166.

There is a common theme. In the present context, all these rights or potential rights are unvested and contingent at the date of sequestration. Once the right vests there is no longer a *spes*. The contingencies vary but are usually related, at least in part, to the survival of various persons. An analysis of the cases shows that sometimes the term *spes successionis* is used to cover all three categories; sometimes it is restricted to category (2), potential rights under a revocable deed. It has to be confessed that category (1), potential legal rights, has undergone little analysis, and to that extent the views of the authors are based more on principle than judicial precedent. Nevertheless it is clear that there is more than one type of *spes*, and the term may be used with a narrower or a broader meaning. Applying the normal rules of judicial precedent, there is good authority which favours the broad meaning. It is possible to give separate labels to each category. For example, category (2) has been called a *spes successionis in destinatione*, distinguishable from the special rights which arise under marriage contracts, which, being onerous, cannot be unilaterally revoked (i.e. category (3)), but which may create a *spes successionis in obligatione*.<sup>7</sup>

## B. HISTORY AND AUTHORITIES

As often with bankruptcy law, there is a history which explains a good deal. We begin with two contrasting cases decided within a few years of each other: *Trappes v Meredith*<sup>8</sup> and *McDonald v McGrigor*.<sup>9</sup> Both were under the Bankruptcy (Scotland) Act 1856. In *Trappes* it was observed that a *spes successionis* did not transfer to a trustee in bankruptcy. In *McDonald* the view was expressed that what was called a *ius crediti* (i.e. category (3)) did pass to the trustee.

*Trappes* is a case with a curious background. It involved the opinion of the First Division, given to the Court of Chancery, about the effect of a Scottish sequestration on rights under an English trust. The case can be understood only with the benefit of the background of the English litigation.<sup>10</sup> Although the opinion of the Court of Session has its difficulties,<sup>11</sup> the case has always been followed.<sup>12</sup>

The case was concerned with *acquirenda*, i.e. assets acquired after bankruptcy. Mr Graham was sequestrated in 1861. In 1863 his wife (domiciled in England) made a will, allowing him an annuity, but subject to conditions, including, perhaps

7 P Fraser, *Treatise on Husband and Wife*, 2nd edn (1876/1878), vol 2 at 1406.

8 (1871) 10 M 38.

9 (1874) 1 R 817.

10 *Trappes v Meredith* (1869) 9 Eq 229; *Trappes v Meredith (No 2)* (1870) 10 Eq 604, (1871) 7 Ch App 248.

11 See Gretton, "Assignment of contingent rights" at 30–31.

12 *Kirkland v Kirkland's Tr* (1886) 13 R 798; *Reid v Morison* (1893) 20 R 510; *Salaman v Tod* 1911 SC 1214.

surprisingly in view of the date of the will, a forfeiture in the event that her husband became bankrupt. At this stage Mr Graham had a category (2) *spes*. Mrs Graham died in 1864. The annuity was to begin in October 1868, after the death of Mrs Graham's mother, who had a life interest in the funds. Mr Graham was discharged in the Scottish bankruptcy in August 1868. The English courts were mainly concerned with the construction of various provisions which affected the annuity and the fact that there was an English bankruptcy as well as a Scottish bankruptcy. The end result was that the annuity did not fall to the husband or his trustee, but on the way to that conclusion the Court of Chancery sought the opinion of the Court of Session on the effect of the Scottish sequestration.

The First Division stated:

By the law of Scotland a right or estate in expectancy or *spes successionis* may be sold and assigned so as to give the purchaser a good title in a question with the seller to the right, estate, or succession, when it comes to be vested in the seller. But such right or estate in expectancy, or *spes successionis*, is not attachable by the diligence of creditors of the person in expectancy or entitled to succeed, and would not be carried to the trustee in his sequestration if he should be discharged before such right, estate or succession was vested in him.<sup>13</sup>

The court said that if the right to the annuity had vested before the date of Mr Graham's discharge, the trustee would have had the benefit of the annuity.<sup>14</sup> The view that rights such as legitim will pass, upon vesting, to a trustee in sequestration, provided that the bankrupt was not discharged, was confirmed in subsequent cases.<sup>15</sup> Because of the opinion expressed by the court (without reasons), the case has been taken as authority for the proposition that a *spes* is not attachable by diligence. On the basis that sequestration is collective diligence, and that what is not attachable by diligence is not affected by sequestration, the view appears to have been taken that this *spes* could not pass to a trustee in bankruptcy.<sup>16</sup>

13 (1871) 10 M 38 at 40.

14 Not merely sums maturing before discharge, but all future sums payable under the annuity as well, because it was decided that the annuity "could be now still claimed under the sequestration for the benefit of Mr Graham's creditors" (at 112).

15 *Aikman, Petitioner* (1893) 30 SLR 804 and *Wishart v Morison* (1895) 3 SLT 29.

16 The view that a category (3) *spes* (which is, of course, unvested) cannot be attached by arrestment is settled by the case-law. Nevertheless, there may be room for suggesting that a more rational approach would be that it can be arrested *tantum et tale*. In *Chambers' Trs v Smith* (1878) 5 R (HL) 151 there was an arrestment of a beneficial right which was vested, but which, notwithstanding the vesting, was subject to a power of variation by the trustees. It was held that the arrestment, though effective, was subject to the power to vary, even though the power was exercised after the arrestment. This suggests that there may be a distinction between a vested but contingent right, which is arrestable, and an unvested one, which is not. The subject is difficult. It is perhaps unsatisfactory if what can be assigned cannot be arrested at all, even *tantum et tale*. See also *Gibson v Wills* (1826) 5 S 74 (NE 69).

A careful reading of *Trappes* suggests that the court did not express a view as to whether or not the annuity had vested and, if so, when. The facts are unusual in that the will was made after the bankruptcy, which created a category (2) *spes*.<sup>17</sup> On the testator's death a right emerged which was affected by the conditions which attached to it, with the result that it did not pass to the bankrupt.<sup>18</sup>

The second case, *McDonald v McGrigor*, involved an unvested contingent right under a marriage contract of the bankrupt's parents, subject to a power of appointment. The Lord Ordinary, Lord Gifford, said that the bankrupt's right was not a *spes successionis*, but a *ius crediti*, which might be modified, but which could not be defeated. *Trappes* was distinguished. On a reclaiming motion the issue was decided in other ways, but Lord Neaves indicated agreement with the approach of the Lord Ordinary. The comments were *obiter*, and it may be doubted whether they remained an accurate statement of the law after later cases.

Judges of the Inner House at the end of the nineteenth century were prepared to classify unvested and contingent rights as being a form of *spes successionis*, even when arising under established trusts (i.e. category (3)). That was the view of the First Division in *Kirkland v Kirkland's Trustee*.<sup>19</sup> This was also the view taken in a decision of seven judges, *Reid v Morison*.<sup>20</sup> In *Reid* there was one dissent (Lord Adam) but otherwise every judge of the First and Second Divisions concurred in the opinion of Lord Rutherford Clark.

In *Reid* the bankrupt had a contingent right under the trust disposition and settlement of his father. Vesting did not take place until the death of the widow and the majority of the youngest child. The court refused to order the bankrupt to assign what was referred to (even by the dissenting judge) as a *spes successionis*. *Trappes* was followed, and *Kirkland* effectively overruled on this point. Lord Rutherford Clark said:

Why cannot an expectancy be attached for debt? The answer is simple. It is not property. The law provides the means of reaching the property of a debtor, of whatever kind it be. It provides none for reaching his expectancies, just because they are not property. We speak of the right of succession. But however well protected that right may be, it is not property in anything. It is a right under which one may become a proprietor. It can be nothing more.<sup>21</sup>

<sup>17</sup> Note that the wording of s 31(5) of the 1985 Act indicates that under current law the *spes* must already exist at the date of sequestration before it can vest in a trustee. This issue is discussed below, pp 139–140.

<sup>18</sup> We are not here concerned with the effect of the English bankruptcy which commenced after the death of the testator but before the first payment of the annuity fell due. This bankruptcy was annulled, which had a different effect from a Scottish discharge, a fact which explains much of the concentration in the reports on the effect of the discharge.

<sup>19</sup> (1886) 13 R 798.

<sup>20</sup> (1893) 20 R 510.

<sup>21</sup> At 512.

The result was that an “expectancy” was not attached by a sequestration.<sup>22</sup> His Lordship also went on to say: “I do not think that an expectancy is a right or power or interest in property.”<sup>23</sup> There can be an agreement to convey the chance, but nothing is thereby conveyed. There is in the opinion a distinction drawn between expectancy on the one hand, and property on the other.

The stimulus for change in the law came in 1910, with the Cullen Report.<sup>24</sup> The Committee found that the existing rule was regarded as unfair to creditors. A bankrupt holding an unvested fee could turn that right into money by selling it on the market.<sup>25</sup> Why should not his trustee be able to do the same? Accordingly the Committee recommended that:

[W]here, under the will or settlement of a person deceased, or under a marriage contract or other deed, instrument, or writing of an irrevocable nature, the bankrupt has any *spes successionis* or non-vested contingent right of succession or interest in property, such *spes successionis* or contingent right should be available to the trustee in his sequestration. . . .<sup>26</sup>

The Committee heard evidence about the idea that transfer of the *spes* should be at the discretion of the court, but took the view that such a rule would be uncertain and arbitrary in its operation.<sup>27</sup> One or two witnesses also mentioned the possibility

22 *Reid* left open, but did not decide, the possibility that a court might refuse to allow the bankrupt his discharge except on condition of assigning any *spes*. Such a possibility would, in a functional sense, but not a formal sense, be similar to a rule transferring the *spes* to the trustee, or requiring the bankrupt to assign it to the trustee. But in practice this possibility was ignored. See also *Obers v Paton's Trs* (1897) 24 R 719 and *Aikman, Petitioner* (1893) 30 SLR 804. In *Obers* the decision in *Reid* was distinguished on the ground that a debtor is not entitled to do any act in relation to a *spes* which might prejudice his creditors, e.g. gratuitously to discharge legitim. The reason was that the *spes* might vest before the debtor's discharge from sequestration.

23 At 514.

24 Report of the Committee on Bankruptcy Law of Scotland and its Administration (Cd 5201) 1910, Brit Sess Papers, IX 607. William J Cullen was the editor of the third edition (1903) of H Goudy, *Treatise on the Law of Bankruptcy in Scotland*, and also assisted Goudy with the preparation of the second edition (1895). He was Sheriff of Fife and Kinross. (See 1926 SLT (News) 1, which has a slight inaccuracy.) In 1909, when the Committee was still sitting, he was appointed to the Court of Session bench. Another notable member of the Cullen Committee was Thomas A Fyfe, Sheriff-Substitute of Lanarkshire, who was to be the editor of the fourth edition (1914) of Goudy's book. (See 1928 SLT (News) 81.)

25 See para 27. However the Cullen Committee may not have fully considered the implications of *Obers v Paton's Trs* (1897) 24 R 719 as stated above in note 22. (*Aikman, Petitioner* (1893) 30 SLR 804 may also be cited in this connection.) The decision in *Obers* is actually rather important. It means that even if a *spes* does not pass to the trustee, the trustee does have the assurance that it will remain intact, so that if it matures into a vested right before the debtor's discharge then the benefit will enure to the creditors. The effect of *Obers* was a sort of half-way-house: the *spes* does not pass to the trustee but, on the other hand, the debtor cannot benefit from it, prior to his discharge.

26 Para 29. At the beginning of para 27 it is remarked that this is the “most important” of the proposals for reform that had been put to the Committee.

27 Para 30.



of transferring to the trustee potential legitim claims,<sup>28</sup> but the Report did not discuss this idea and did not include it as a recommendation.

This impetus for reform was strengthened by a case decided the following year, *Salaman v Tod*,<sup>29</sup> in which, under the provisions of the English Bankruptcy Act 1883, a *spes successionis* in a Scottish trust was held to vest in an English trustee in bankruptcy. At the date of bankruptcy the bankrupt was aged twenty-one, and had a contingent right to the fee of the residue of his father's estate. Vesting was postponed until the age of twenty-five (i.e. category (3)). There being no vesting, the Lord Ordinary, Lord Skerrington, said that the bankrupt had "nothing more than a *spes successionis* or protected right of succession".<sup>30</sup> That such a right did not pass to a trustee in bankruptcy under the Bankruptcy (Scotland) Act 1856 was "trite law".<sup>31</sup> He refused to give the English trustee higher rights than a Scottish trustee. On a reclaiming motion the First Division applied the English statute which defined property as including "every description of estate, interest, and profit, present or future, vested or contingent . . .". The trustee had acquired the *spes successionis*, which a Scottish trustee could not. Lord Mackenzie did refer to two meanings of *spes successionis* which correspond to the distinctions between categories (2) and (3). As the case involved category (3), it was unnecessary for the trustee to argue that there was vesting in him of a "pure" *spes successionis*, such as a hope to benefit under the will of a person still alive.

Lord Kinnear referred to the policy differences which were for the legislature: should a *spes* pass to a trustee or not? The answer was different in England and Scotland. But not for long. The Bankruptcy (Scotland) Act 1913 changed the law, precisely as proposed by the Cullen Committee, and indeed almost in the same words. The definition of "property" and "estate" in s 2 of the Act included "any non-vested contingent right of succession or interest in property conceived in favour of the bankrupt under the will or settlement of any person deceased, or under marriage contract, or under any other deed, instrument or writing of an irrevocable nature". The whole "property" of the debtor vested in the trustee by the act and warrant.<sup>32</sup> In the case of moveable property this was to the same effect as if actual delivery or possession had been obtained, or intimation made at the date of sequestration. The trustee was given a power to insure the bankrupt's life to assist the realisation of any non-vested, contingent right or interest which was vested in the trustee, or to prevent the value of the *spes* being lost by the death of the bankrupt. Compulsory medical examination of the bankrupt was possible.<sup>33</sup> The idea was that a trustee would sell

28 See e.g. paras 3872, 3876 and 4904–4909 of the transcript of evidence.

29 1911 SC 1214.

30 At 1217.

31 Ibid.

32 Section 97.

33 1913 Act, s 78. See also H Goudy, *Bankruptcy*, 4th edn (1914), 312.

the rights of the bankrupt. Property vesting in the bankrupt after the date of sequestration, but before discharge, could be acquired by the trustee.<sup>34</sup> The possibility of the trustee waiting around after discharge of the bankrupt to acquire rights then vesting in the bankrupt, was not likely to arise.

It will have been noted that under the 1913 Act vesting was confined to rights under irrevocable wills, settlements or marriage contracts. The phrase “any other deed”, etc would presumably have been construed subject to the *eiusdem generis* rule. In other words the 1913 Act applied to category (3) potential rights which existed at the date of sequestration. Category (1) and (2) potential rights did not pass to the trustee. As far as those categories were concerned, the law remained as it had been before 1913.

### C. THE CURRENT LAW

All this was changed, and the law thrown into confusion, by the Bankruptcy (Scotland) Act 1985. The Act was passed “to reform the law of Scotland relating to sequestration and personal insolvency”. So there is no presumption that it did not intend to change the law. Section 31(5) has been quoted above. It vested in a permanent trustee “[a]ny non-vested contingent interest”. The limitations to wills, settlements, marriage contracts and other *irrevocable deeds* have disappeared. The reference to “property” has disappeared. There is added a reference to vesting “as if an assignation of that interest had been executed by the debtor and intimation thereof made at the date of sequestration”. This raises questions as to whether the “interest” must be capable of both assignation and intimation.

Why were the changes made? The Scottish Law Commission Report on Bankruptcy, which preceded the 1985 Act, is of little assistance.<sup>35</sup> The draft Bill has a clause in the same terms as s 31(5).<sup>36</sup> There is a note to the clause: “The provision may be useful where any such interest vests (by purification of the contingency) *after* the date of the debtor’s discharge.” This appears to imply that the trustee may indeed be waiting around after the debtor’s discharge to catch the bounty which falls to the debtor. The text of the Report does not discuss the issue, despite a heading which refers to contingent rights of property.<sup>37</sup> The provision which enabled a trustee to insure the life of the bankrupt and compel medical examination was regarded as “excessive” and was not re-enacted.<sup>38</sup> But the much more significant changes are not explained.

34 1913 Act, s 98(1).

35 Scot Law Com No 68, 1982.

36 Clause 30(6), Report at 434.

37 At 162–164, paras 11.18–11.21.

38 At 143, para 10.10.

Section 31(5) uses the word “interest” without reference to “property” or “estate”. It will be recalled that in *Reid* six judges treated a *spes successionis* as not being property. A *spes successionis* in any of its senses is non-vested and contingent. Can it be an “interest”? On this views may differ. In this context the word “interest” has been treated by a Temporary Sheriff Principal as meaning “a legal concern in a thing or in a property, by having a right or title to make a claim in that thing or property”.<sup>39</sup> Perhaps this does not advance matters very much. A “concern” is no more precise than an “interest”.<sup>40</sup>

There is a stateable argument that what vests under s 31(5) can only be an “interest” which is capable of being assigned, with the assignation completed by intimation. The reason behind this approach is that the Act says that a “contingent interest” vests in the trustee “as if an assignation of that interest had been executed by the debtor and intimation thereof made at the date of sequestration”. A *spes* under categories (1) and (2) can be assigned but the assignation cannot be completed by intimation. A category (3) *spes* can be assigned and title can be completed by intimation.<sup>41</sup> On the basis of that reasoning, the 1985 Act covers only category (3), and thus does not materially change the law. No difficulty arises with category (3) cases.<sup>42</sup> The problem arises for categories (1) and (2). How is the assignee to complete title? How is intimation to be made? In *Bedwells & Yates v Tod*<sup>43</sup> there was an assignation of a legacy under a will of someone who was still alive. The assignee intimated to the executor under the will. After the death of the testator creditors of the assignor and legatee arrested in the hands of the executor. The court preferred the arresters. On the intimation point the court held “that intimation could only be made to the cedent’s debtor; that the testator could not be contemplated as such;

39 *Ross v H J Banks & Co Ltd* 1998 SCLR 1109 at 1115.

40 The word “interest” is a problematic one. We suggest that it can bear (at least) three meanings. (1) It may mean “patrimonial interest”, i.e. the fact that a person stands to gain or lose from some outcome. Thus in some types of action there is a distinction between “title” and “interest”. An interest in this sense may be held by one person for the benefit of another. Thus a trustee has an “interest”. (2) It may mean “right” in the very broad sense of “patrimonial right”. In this sense most rights in private law would be “interests”. In the law of trusts the term “beneficial interest” is a familiar one, and here “interest” is being used in this sense. (3) It may mean “real right”. Thus in some statutes the phrase “interest in land” appears to mean a real right in land.

41 See, as an example, where the intimation was in fact ineffective, *Browne’s Trustees v Browne* (1901) 9 SLT 128.

42 The 1913 Act referred to assignation and intimation in s 97(4), but being confined to category (3) no problem arose, since a category (3) *spes* is capable of an assignation completed by intimation.

43 Dec 2 1819, Fac Dec; this case is not cited by Bell in the fourth edition of his *Commentaries*, published in 1821, but he added it to the fifth edition in 1826 (the volume of *Faculty Decisions* having been published in 1825) with a new section of text which commenced: “A legacy is not capable of assignation during the testator’s life. The bequest, at whatever time originally made, is held to be incessantly renewed till the last rational moment of the testator’s life” (5th edn, 2.16). This text is retained in the seventh edition (same page citation as fifth edition). Bell chose *Bedwells* as a case to cite in his *Illustrations* (1838, vol 2, 445).

and that the intending executor was not such while the testator lived". Hence, it appears, there could not be intimation until the testator died. This leads to the argument that s 31(5) of the 1985 Act can apply only to a *spes* of category (3).

The contrary argument is that most incorporeal rights can be assigned, unless *delectus personae* is involved or the right prohibits assignment.<sup>44</sup> There is, therefore, no barrier to the assignation of a *spes successionis*. For what it is worth, there may be a sale and assignation of a chance of succeeding in another's estate. On the authority of *Trappes* and other cases<sup>45</sup> a *spes successionis* may be assigned. So a deemed assignation to a permanent trustee is not obvious nonsense. The words "as if" do not require that there be an assignation and intimation. The draftsman would also wish to give the trustee a right which could not be defeated as a result of some prior unintimated assignation by the debtor, so it was natural to say that the trustee had the equivalent of an intimated assignation.

### (1) A problem of timing

We must now say something about an issue which has, so far, been avoided. Up to now we have presupposed that the *spes* (of whatever kind) was already in existence at the time of sequestration. But this need not be so. It might be, for instance, that Anna makes her will, giving a legacy to Chris, in the interval between his sequestration and his discharge. (Presumably she is confident that she will not die until after he is discharged.) This could be either a category (2) or a category (3) *spes*. Might this point of timing make any difference?

Under the 1913 Act it made no difference. Section 98 of that Act provided that all "estate" which the bankrupt acquired after the sequestration but before the discharge would pass to the trustee, and s 2 of the Act defined "estate" so as to include a category (3) *spes*. That was clear enough. But the 1985 Act, in another infelicity of drafting, changes what was clear into something less clear. The provision which has been quoted above, s 31(5), deals with estate at the date of sequestration. It is the next section, s 32, which deals with *acquirenda*. Section 32(6) says that "any estate . . . which . . . is acquired by the debtor . . . and . . . would have vested in the permanent trustee if it had been part of the debtor's estate on the date of sequestration shall vest in the permanent trustee". But there is no definition of "estate" and s 32 (unlike s 31) has no express provisions to deal with a *spes successionis*. "Interest" is different from "estate", and it is only "estate" which is caught by s 32(6), at least on

44 Erskine, *Institute*, 3.5.2; *Traill & Sons v Actieselskab Dalbeattie Ltd* (1904) 6 F 798 at 806 per Lord Kinnear; *Cole-Hamilton v Boyd* 1963 SC (HL) 1; *Libertas-Kommerz GmbH v Johnson* 1977 SC 191; *M R S Hamilton Ltd v Keeper of the Registers of Scotland (No 1)* 1999 SLT 829 at 834, 835 per Lord Hamilton.

45 E.g. *Rothwell v Stuart's Trs* (1898) 1 F 81; *Browne's Tr v Anderson* (1901) 4 F 305; *Robinson v Robinson's Trs* 1934 SLT 183.

a literal reading. This being so, it must be regarded as doubtful whether a *spes* acquired in the interval between sequestration and discharge is affected, even if it is a category (3) *spes*.

If that inference is correct (and there might be room for doubt), then the odd consequence would be that the 1985 Act denies to the trustee a *spes* which would have passed under the 1913 Act. That is odd because at the same time the 1985 Act may be (depending on what view is taken) giving to the trustee other sorts of *spes* which the 1913 Act would not have given. This is, therefore, further reason for doubting whether the text of the 1985 Act in this area was given proper consideration.

## (2) Not only wills and trusts?

One of the problems with s 31(5) has only been hinted at so far. Its wording is not confined to rights or interests in succession (unlike its predecessor in the 1913 Act). The scope of s 31(5) is unfathomable. It has been applied to fishing licences in an unreported decision by Sheriff Meston,<sup>46</sup> and to a commission fee for the introduction of a buyer of property.<sup>47</sup> One wonders whether it might apply to a *spes* under a special destination. Suppose that Morag and Robert are co-owners of a house, with a survivorship destination in the title. That means that Morag owns half, with a destination to Robert, and Robert owns half, with a destination to Morag. Suppose that Morag is sequestrated. Robert buys her half share from the trustee, and the trustee duly disposes that half share to him. Four years later Robert dies intestate. Could Morag's trustee now claim half of the property? The argument would be that when she was sequestrated she had a *spes* to Robert's share, and that this *spes* passed to the trustee. If that is right, the end result would be that Robert's estate would end up with the half share originally held by Morag, and the trustee would end up with the half share originally held by Robert. This result seems absurd, but would apparently ensue from a broad reading of s 31(5).<sup>48</sup>

Another difficult area is claims for *solatium*. Suppose that a person is injured and later sequestrated. Can the trustee claim for the creditors the right to *solatium*? If compensation by way of *solatium* is paid before the debtor's discharge, it passes to the trustee.<sup>49</sup> But if it is paid after the discharge, what then? The law is less than clear. In the leading modern case, *Coutts's Trustee v Coutts*,<sup>50</sup> the debtor was injured,

<sup>46</sup> *Cay's Tr*, Peterhead Sheriff Court, 19 Jan 1995.

<sup>47</sup> *Ross v H J Banks & Co Ltd* 1998 SCLR 1109.

<sup>48</sup> This result, arising from a broad reading of s 31(5), could be prevented by careful conveyancing: the disposition by the trustee to Robert ought to be in the form of a disposition by both the trustee and Robert in favour of Robert of the whole property and not just of Morag's half share. See further G L Gretton and K G C Reid, *Conveyancing*, 2nd edn (1999), ch 26.

<sup>49</sup> *Jackson v McKechnie* (1875) 3 R 130.

<sup>50</sup> 1998 SC 798. Also reported at 1998 SCLR 729, with a commentary by one of the present authors at 741.

and later, on 13 June 1990, was sequestered. He raised an action for damages, including *solatium*, on 26 February 1992. He was discharged from his bankruptcy on 13 June 1993, and soon thereafter the action was settled by a payment. It was held that he was obliged to pay this money to his trustee. The basis of the decision is that the right to *solatium* vests when the action is raised,<sup>51</sup> and therefore if it is raised before discharge it vests in the trustee under the *acquirenda* provisions of the 1985 Act. The decision might suggest that the right to compensation is not a “non-vested contingent interest” as at the date of sequestration, for if it were such an “interest” the trustee would not have needed to base his position on the *acquirenda* provisions. However, this may just be an accident of pleading. No serious attempt seems to have been made by the trustee to argue that s 31(5) was applicable. Accordingly the court says nothing of that subsection.<sup>52</sup> However, it might perhaps be contended that if the court had thought that s 31(5) was applicable it would have said so.

So the meaning of s 31(5) may have wide implications,<sup>53</sup> although there must be limitations. For example, it would be absurd to hold that the trustee was vested in the debtor’s contingent future reversionary right to any surplus which might emerge in the event that the trustee was able to pay off all creditors in full. Nevertheless, our analysis of *spes successionis* should not be viewed as the only possible analysis of interests which may be affected.

### **(3) Does a trustee in sequestration acquire a right to a *spes successionis*?**

The question in the end is one of statutory interpretation in the light of the background law, plus considerations of policy. Reasonable minds may differ about the meaning of s 31(5). The arguments are as follows and the reader must decide which proposition would be favoured in court.

51 The court expressly states that the right vested in the trustee on 26 Feb 1992. It may, however, be said that Lord Prosser, while not dissenting, was evidently attracted by the idea that a right to *solatium* should not be treated differently from other claims and the right could vest at the date of sequestration. Lord Caplan was of a different view and made the interesting point that if the right vested in the trustee, it was difficult to see how a debtor could have a title to sue. This may illustrate another unintended consequence of s 31(5) attempting the logical fallacy of vesting an unvested right. The subsection affects title and interest to sue.

52 However, Sheriff Principal Risk, in the court below, said that “a potential claim for *solatium* which has not been brought to court does not form part of the estate of the debtor which vests in the trustee at the date of sequestration”. (See 1996 SCLR 1026 at 1029.) But the Sheriff Principal seems not to have had the benefit of argument on this point, and it was not part of the *ratio* of his decision.

53 Various rights which might arise under annuities, pension policies and insurance policies might give rise to several interesting questions. See, in England, *Re Landau* [1998] Ch 223; *Scientific Investment Pension Plan Trusts* [1999] Ch 53. Royalties payable in the future in respect of scripts written by the debtor might be another interesting case: cf *Performing Right Society Ltd v Rowland* [1997] 3 All ER 336.

In favour of a trustee acquiring rights to all categories of *spes* under s 31(5) is the very general language of the subsection. It refers to “[a]ny” interest. All forms of *spes successionis* are assignable: this has been the law at least since *Trappes*. A *spes* may be assigned and sold by the trustee; and the trustee should be vested in all assets which have worth, except those which, for policy reasons, the legislature has clearly decided to exclude from the sequestration process. Intimation of an assignation is not always necessary.<sup>54</sup> There is a difficulty in intimation of potential rights under categories (1) and (2). The reference to intimation does not, however, remove from vesting in a trustee a right which would otherwise have vested. The right is transferred “as if” there had been intimation, whatever that intimation is worth. The effect is that legal rights and rights under wills, existing at the date of sequestration, can pass to a trustee. There is an element of lottery in that rights may change. The will may be altered because a legatee has been sequestrated, for example. People may die in unexpected sequences with unexpected consequences. There are practical difficulties arising from this interpretation of s 31(5) and it is thought that these, more than any detailed consideration of the prior law, will make a court hesitant. But there are also policy considerations in deciding which rights vest in a permanent trustee, and which do not. As recognised by Lord Kinnear, the policy is a matter for the legislature. There is the limitation that the interest must exist at the date of sequestration. Even if the section appears unfortunately drafted, effect must be given to its terms.

On the other hand, the argument that a trustee’s rights under s 31(5) may be limited to category (3) rights, because of the reference to intimation, cannot be easily ignored. The draftsman is presumed to know the underlying common law and it cannot be intended that a right which was incapable of intimation at, or prior to, the date of sequestration vested in the permanent trustee. This was the approach of Temporary Sheriff Principal Wheatley, admittedly in a case which did not raise the present issue,<sup>55</sup> when he referred to the fact that an interest was capable of assignation and intimation. Also the practical difficulties of a wider interpretation of s 31(5) cannot be ignored. It appears to be suggested that legal rights could be claimed by a trustee years—even decades—after the discharge of the debtor. It is unlikely that this could have been Parliament’s intention.<sup>56</sup> Questions of policy should not be disregarded in attempting to ascertain the meaning of a difficult statutory provision.

54 McBryde, *Contract*, para 17–100.

55 *Ross v H J Banks & Co Ltd*, note 39 above, at 1115.

56 It is important to note that there is a sense in which a sequestration never ends, even though the debtor has been discharged. Even as and when the trustee himself/herself is eventually discharged, the sequestration has a shadowy continued existence. If some “interest” existed at the date of sequestration which one day matures into an asset of value, a new trustee can be appointed to realise it for the old creditors. There is no time limit, other than what may arise due to the long negative prescription.

Furthermore, if s 31(5) extends to category (2), an odd consequence ensues. Suppose that in year one Anna makes a will with a legacy to Chris. In year two Chris is sequestered, and in year five he is discharged. If Anna, in year six, tears up her will and makes another, which is in wholly identical terms, the effect of the will is utterly changed. For (on the view of s 31(5) now under consideration) if she had died with the original will intact, the legacy would have passed to the trustee in sequestration. But under the new (identical) will the legacy goes to Chris. Yet the terms of the will have not changed. Nor has her intention. Her intention under both wills was that the legacy should go to Chris. But if the terms of the will have not changed, and the intentions of the testator have not changed, why should the effect of the legacy have changed? As Bell says, "the bequest, at whatever time originally made, is held to be incessantly renewed till the last rational moment of the testator's life".<sup>57</sup>

Professor McBryde inclines to the view that the 1985 Act must be regarded as having changed the law, so that a permanent trustee acquires rights to various forms of *spes*. Professor Gretton inclines to the contrary view. But both authors view the matter as being of some difficulty, and neither is completely confident as to what the result will be as, and when, the matter is tested in the courts. Both authors agree that it would be desirable if the doubts were to be removed, one way or another, by legislation.

#### D. WHAT SHOULD THE LAW BE?

There is no self-evidently correct approach, in policy terms, to issues of this sort. Scots law has swung from a position whereby every sort of *spes* was excluded from sequestration (the pre-1913 position), to a middle course (1913 to 1985) and finally to a position where (on one view) every sort of *spes* passes to the trustee in sequestration, provided that the *spes* existed at the date of sequestration. In the United States the rule is even more anti-creditor than the pre-1913 Scottish position. Not only is every sort of *spes* excluded, but even rights of succession vesting more than 180 days after the bankruptcy are excluded, and can be kept by the bankrupt.<sup>58</sup>

57 *Commentaries*, 2.16. See note 43 above. Scots law has the principle that *ambulatoria est voluntas defuncti usque ad vitae supremum exitum*. ("The will of a deceased remains provisional until the final termination of life.") See D 34.4.4 (Ulpian), and cf D 23.1.32.3; Stair, *Institutions*, 3.8.1; J McLaren, *Law of Wills and Succession*, 3rd edn (1894) vol 1, 415, para 752. It is on this basis that D V Cowen has argued, in the context of South African law, that a legacy is not a contingent right while the testator lives. He inclines to the same conclusion for potential rights to succeed *ab intestato* but concedes that the point is not settled: "Vested and contingent rights" (1949) 66 *South African Law Journal* 404.

58 US Bankruptcy Code, s 541(a)(5). (Under art 1(8)(4) of the US Constitution bankruptcy is a matter for federal legislation.) See *In re Hicks* (1982) 22 BR 243 (Federal Bankruptcy Court for the Northern District of Georgia). Here property was subject to a life estate to the bankrupt's mother. The bankrupt held the remainder (the equivalent of the fee) but only contingently. It was held that the remainder did not form part of the bankrupt estate.



In South African law the position is similar to the Scottish position under the 1913 Act.<sup>59</sup> In German law the decision whether or not to accept a legacy or other succession right belongs to the person concerned as a “personality right”. To take it away would be a violation of that person’s rights as a human being. Thus even during the bankruptcy itself the debtor can accept or reject, as she or he chooses. In the event of acceptance the creditors will benefit, but they cannot compel the debtor to accept.<sup>60</sup> After the proceedings have been closed (which happens after the final distribution is made), there will (in the typical case<sup>61</sup>) follow a seven-year period in which the debtor can keep one half of any succession right which accrues, the other half passing to the creditors.<sup>62</sup> Any succession rights arising after the end of this seven-year period will belong to the debtor absolutely. The possibility of a mere *spes* passing to the trustee<sup>63</sup> does not arise.

In English law the “property” of the bankrupt passing to the trustee under the Insolvency Act 1986 is defined as including “every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property”.<sup>64</sup> But there seems to be a distinction between “property” in this broad sense and a mere “expectancy” or “possibility of an interest”.<sup>65</sup> The distinction seems to be between a contingent interest in something already existing, such as a contingent interest in an existing trust fund, and, on the other hand, a possible interest in something which does not exist but which may one day exist. How workable all this is in English law is not for us to say.

There is evidently a strong case for saying that a contingent or potential right, which has a present market value, ought to pass to the trustee, even if it is not a vested right. This argument was forcefully pressed by a majority of those who gave evidence to the Cullen Committee.<sup>66</sup> However, the argument applies chiefly to category (3), and the recommendations of the Cullen Report deal only with rights of

59 W H Mars, *The Law of Insolvency in South Africa*, 8th edn by Elmarie de la Rey (1988) at 186.

60 *Insolvenzordnung* (Insolvency Act) art 35 read with art 83.

61 That is to say, if the debtor asks for, and the Court allows, a *Restschuldbefreiung*, corresponding roughly with our concept of the discharge of the debtor.

62 *Insolvenzordnung* art 295.

63 *The Insolvenzverwalter*.

64 Section 436. The wording is similar to the wording in the Bankruptcy Act 1883 which was considered in *Salaman v Tod*, note 29 above.

65 *Halsbury's Laws of England*, 4th edn, vol 3(2), para 392, and see *Campbell (A Bankrupt)* [1997] Ch 14. Here a person became bankrupt in 1990, and in 1992 received an *ex gratia* compensation payment from the Criminal Injuries Compensation Board for an assault that had taken place in 1984. It was held that nothing had passed to the trustee. Curiously, the report is silent as to the possibility that the payment, when made, should have passed to the trustee under the *acquirenda* provisions of s 307 of the Insolvency Act 1986. For the Scottish position in such cases see McBryde, *Bankruptcy*, para 9–146. We should add that we have made no attempt to resolve the uncertainties which may exist in English law.

66 There were, however, some dissenters among those who gave evidence.

that kind. If there were to be an extension beyond category (3) it would be to category (1), for legal rights in succession, such as legitim, are indefeasible by will. In theory, therefore, a potential right to legitim might be regarded as a marketable commodity. But in practice such rights (unlike category (3)) are not readily marketable,<sup>67</sup> so there is little practical point in giving them to the trustee. (One reason, one supposes, why a potential right to legitim is not in practice marketable is because the person from whose estate the claim would be eligible can in practice defeat such a claim by a variety of devices and, in any event, the valuation of the claim is problematic.)

But if potential legitim is caught, the consequences are strange, and, we would suggest, unacceptable. For it would mean that if someone with a living parent is sequestrated, the trustee in sequestration will in effect be deemed the child of that parent for purposes of legitim, however many years may pass until the parent dies. We gave earlier an example, and repeat it here. Chris is sequestrated in 1986 and discharged in 1989. His mother, Anna, dies in 2020. Is Chris's trustee to be deemed Anna's child for succession purposes, more than thirty years after the bankruptcy? That may, or may not, be the present law. But we do not hesitate to say that if it is the law, it ought not to be, for it is surely inconsistent with the spirit and traditions of Scottish bankruptcy legislation.

What, then, are the options?

The first would be to restore the position as it was under the 1856 Act. That was unfavourable to creditors, and we agree with the Cullen Committee that it was unsatisfactory.

The second would be to restore the position to what it was under the 1913 Act<sup>68</sup> on the basis that that was a workable approach which represented a reasonable compromise between competing interests.<sup>69</sup>

The third would be to revert to the position under the 1913 Act, but extended in certain ways, for instance to include legal rights in succession.

The fourth would be to follow English law, whatever that is, but without a limit to succession rights.

In the fifth place, quite different approaches might be considered, such as that of US law.

Whichever option may be best (and views will inevitably differ), we would make certain technical observations. The first is that the present wording of the 1985 Act is obscure, and, as a result, is giving rise to needless disputes. The contrast with the clarity of the 1913 Act is striking. Reform is needed to make the law clear. In the

67 We state this as a matter of impression. We have not checked the point empirically.

68 It may of course be that the law under the 1985 Act is the same as it was under the 1913 Act. By using the word "restore" we are not prejudging that question.

69 The authors are impressed by the pragmatic approach of the Cullen Committee, and are not, at the moment, persuaded that a change from that position can be justified.

second place, any reform should take into account what we have called, above, the problem of timing. Thus, if it is decided that a category (2) *spes* should pass to the trustee, a further decision has to be made as to whether it makes a difference when the will was made. The third technical suggestion is that the word “interest” might usefully be dropped. The fourth is that the reference to a deemed intimated assignation needs to be considered carefully. If the provision is to extend to rights which are incapable (at least at the relevant time) of intimated assignation, then the “deemed intimation” provision is confusing.<sup>70</sup>

70 It could be retained but subject to a rider that would apply only insofar as relevant.